Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

(2)

No. 96-462

In The
Supreme Court of the United States
October Term, 1996

KGET-TV Channel 17, KERO-TV Channel 23, KBAK-TV Channel 29, The Bakersfield Californian and Buck Owens Production Company, Inc., dba KUZZ-FM,

Petitioners,

v.

Superior Court of the State of California in and for The County of Kern, People of the State of California and Offord Lee Rollins IV,

Respondents

Response of the Superior Court to Petition for Writ of Certiorari to the California Supreme Court

---

B. C. Barmann, Sr., County Counsel
By Robert D. Woods, Chief Deputy,
Counsel of Record
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
(805) 861-2326

Counsel for Respondent
Superior Court of the State of California in and for the County of Kern

31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court exercise jurisdiction where there is no threat to First Amendment standards governing press access to criminal trials?

2. Should the Supreme Court exercise jurisdiction to review the decision of the lower court, where the lower court properly used its discretion to carefully balance important First Amendment and Sixth Amendment concerns?

LIST OF PARTIES TO PROCEEDINGS BELOW

Offord Lee Rollins, IV, Defendant

The People of the State of California, Plaintiff

The Superior Court of California, in and for
the County of Kern, Trial Court

KGET-TV Channel 17, Petitioner

KERO-TV Channel 23, Petitioner

KBAK-TV Channel 29, Petitioner

The Bakersfield Californian, Petitioner

The Buck Owens Production Company, Inc.,
dba KUZZ-FM, Petitioner

Table of Contents

Page

QUESTIONS FOR REVIEW i

LIST OF PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTION 1

APPLICABLE LAW 1

STATEMENT OF THE CASE 1

ARGUMENT 4

I. FIRST AMENDMENT ACCESS RIGHTS ARE CONDITIONAL WHEREAS SIXTH AMENDMENT RIGHTS ARE ABSOLUTE 4

II. RESPONDENT SUPERIOR COURT CORRECTLY BALANCED FIRST AND SIXTH AMENDMENT INTERESTS . 5

III. NO THREAT OF FUTURE CONSTITUTIONAL VIOLATION EXISTS 11

CONCLUSION 13

APPENDIX A . . . . . APP. 1

California Code of Civil Procedure Sections

Page

APPENDIX B . . . . . APP. 2
U. S. Constitution, First and Sixth Amendments

APPENDIX C . . . . . APP. 3
Excerpts From Opinion of Fifth District Court Of Appeal in *People v. Rollins*, Case No. F020541

Table of Authorities

Federal Cases

Page

Gannett v. DePasquale, 443 U.S. 368 (1979) 8

Globe Newspaper Company v. Pokaski, 868 F.2d 497 (1st Cir., 1989) 7, 11

Globe Newspapers Co. v. Superior Court for Norfolk Co., 457 U.S. 596 (1982) 5

In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984) 11, 12

Press Enterprise Co. v. Superior Court, Riverside County (Press-Enterprise I) 464 U.S. 501 (1984) 4, 5, 8, 9, 10, 12, 14

Press-Enterprise Co. v. Superior Court, Riverside County (Press-Enterprise II) 478 U.S. 1 (1986) 5, 8, 9, 10, 12, 14

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 5

United States v. Three Juveniles, Globe Newspaper Co., Intervenor, 61 F.3d 86 (1st Cir. 1995) 11

Waller v. Georgia, 467 U.S. 39 (1984) 11

State Cases

Page

Copley Press, Inc. v. Superior Court, 228 Cal.App.3d 77 (1991) 7

Jones v. Superior Court, 26 Cal.App.4th 1202 (1994) 9

Lesher Communications v. Superior Court, 224 Cal.App.3d 774 (1990) 7

Rollins v. People, 1996 Cal. LEXIS 3597 1

Other

28 United States Code
Section 1257 1

California Code of Civil Procedure
Section 206 8
Section 237 . . . . . 8, 9

DECISIONS BELOW

The decisions and orders of Respondent Superior Court, and the orders of the California Fifth District Court of Appeal are not reported. The decision of the California Supreme Court is not officially reported, but is unofficially reported at 1996 Cal. LEXIS 3597.

JURISDICTION

This is a petition addressed to the ruling of the highest court of a state, wherefore this Court has jurisdiction pursuant to 28 U.S. Code § 1257.

Petitioners' application to the California Supreme Court was denied by order dated June 25, 1996.

APPLICABLE LAW

The First and Sixth Amendments to the U. S. Constitution pertain, and are contained in the Appendix. Also pertinent are Sections 205(d), 206, 223 and 237, also contained in the Appendix.

STATEMENT OF THE CASE

Offord Rollins, IV, was convicted of murder on April 3, 1992, in the Kern County Superior Court, Case Number 47815. Rollins appealed his conviction, and California's Fifth District Court of Appeal reversed his conviction on May 11, 1995, in an excoriating 247 page opinion in their Case Number F018547. The Fifth District Court of Appeal based their ruling on cumulative error. While no single error was prejudicial enough to require reversal, numerous instances of prosecutorial misconduct and one serious issue of juror misconduct, together with criticism of the handling of the case by the trial court and defense counsel compelled the conclusion Rollins had not received a fair trial by an impartial jury.

The People then re-prosecuted Rollins, the case ending with a hung jury. Subsequent to filing of the Petition in this Court, the People announced there would be no further prosecution of Rollins.

The Superior Court made two rulings which are attacked in the Petition before this Court. The Superior Court, Judge Turner, ruled that Petitioners could not be present for in limine motions prior to empaneling a jury, and denied access to juror questionnaires. Public access to the actual voir dire was not denied, the only limitation being an order no visual or acoustic recording devices were allowed to protect the identities of prospective jurors during the voir dire process.

Judge Turner issued a detailed memorandum order regarding these matters and discussing the many considerations which necessitated his decision. In response to Petitioners' application to the Superior Court, Judge Turner elaborated the basis and reasoning for his decision on the record. Judge Turner's memorandum decision is contained in Appendix C to the Petition, and his ruling from the bench is contained in Appendix D to the Petition.

Since the People's announcement no further prosecution would be undertaken, no request for access to a transcript of the motions in limine has been made, to the knowledge of the Superior Court. No further request for juror questionnaires has been received since the District Attorney's announcement either.

Trials do not occur in a vacuum. Each addresses a specific set of facts and involves a unique set of people and circumstances. As the Petition correctly notes, the first Rollins trial was attended by substantial and widespread publicity. The case involved the murder of a 17 year old Hispanic woman, allegedly by a 17 year old Black man, a noted local young athlete with a promising future. Given these circumstances, publicity was not only widespread, but lurid, rife with trans-ethnic and sexual overtones. As the Petition states, because of the

sensational aspects of the case, publicity appeared locally, regionally and even nationally.

The pictures presented at the first trial heightened public interest. The defense asserted Rollins' well-documented athletic accomplishments, and attempted to portray Rollins as a pillar of his community, respected, polite, caring and respectful. To contradict this image, the People attempted to paint Rollins as evil, asking questions which inferred or baldly accused Rollins of being a "sexual savage," a dominating, pleasure-seeking individual who used the victim for abusive sexual purposes and then killed her when she became an annoyance. Questions by the prosecution, in the absence of admissible supportive evidence, which inferred or accused Rollins of sodomy, exhibitionism and reprobate conduct were declared misconduct by the Court of Appeal in reversing the case.

The opinion reversing Rollins' initial conviction also addressed the issue of a juror who failed to reveal his prior knowledge of the crime scene and activities common in the area which could affect the crucial issue of when the murder occurred and therefore the viability of Rollins' alibi evidence. This material omission by one juror was prejudicial, in and of itself.

Judge Turner therefore faced a second trial in a case where there had been massive and lurid publicity about three years earlier. The passage of time had doubtless dulled specific memories of prospective jurors concerning the details of the original trial.

Judge Turner was also well aware of the Fifth District Court of Appeal opinion which addressed critically and in extended detail, many instances of improper evidence, prosecutorial misconduct in the form of prejudicial questions, a juror's failure to reveal pertinent foreknowledge, and the shortcomings in handling the case by defense counsel and the first trial court.

Against this background, Rollins moved to exclude the public from all preliminary proceedings and voir dire. The Prosecution and the People of the State of California,

concurred in this request, being likewise concerned about the extreme possibilities of prejudice and contamination of potential jurors by exposure to sensational publicity. Judge Turner was thus presented with the unusual situation of the People, represented by the District Attorney, acceding to the Defendant's request for closed proceedings, and a request by Petitioners, who claimed to also represent the public, for unrestricted access. Judge Turner considered both State and Federal law and precedent, weighed the competing rights and issued narrowly-tailored orders designed to prevent potential jurors from being contaminated by exposure to inadmissible, irrelevant and lurid information.

Under these facts and circumstances, the greatest care to avoid a repetition of the first trial was needed. The Sixth Amendment right of Offord Rollins to a fair trial by an impartial jury had been trammeled in the first prosecution, and therefore taking careful, circumscribed steps to protect against tainting the jury through pretrial publicity of lurid but inadmissible evidence was an imperative. Protection of prospective jurors in order to foster complete and open answers to critical and sensitive questions about the evidence and issues to be confronted was also mandatory, to assure Rollins would receive a fair trial the second time around. That the second prosecution yielded a different outcome than the first validates the care taken by Judge Turner in balancing the qualified First Amendment rights of Petitioners against the paramount Sixth Amendment rights of Offord Rollins.

ARGUMENT

I. FIRST AMENDMENT ACCESS RIGHTS ARE CONDITIONAL WHEREAS SIXTH AMENDMENT RIGHTS ARE ABSOLUTE.

"No right ranks higher than the right of the accused to a fair trial." (*Press-Enterprise Co. v. Superior Court, Riverside Co.*, 464 U.S. 501, 508 (1984)(hereafter *Press-Enterprise I*).

This Court reiterated the premise that First Amendment access rights are conditional and must be weighed against the right of the accused to a fair trial in *Press-Enterprise Co. v. Superior Court, Riverside Co.*, 478 U.S. 1, 9 (1986)(hereafter *Press-Enterprise II*). This Court has further noted the right of public access to criminal trials is a shared right, being an absolute right of the accused under the Sixth Amendment and a qualified right of the public. Open hearings assure defendants proceedings will be subject to public scrutiny, and provide assurance to the public that fairness is the hallmark of criminal proceedings, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569*ff* (1980).

Phrased differently, when a First Amendment access right attaches to a proceeding, it is qualified and not absolute, *Press-Enterprise II, supra, 478* U.S. 1, 9; See also *Globe Newspapers Co. v. Superior Court for Norfolk Co.*, 457 U.S. 596 (1982). Closed proceedings may be had when, and only when, cause exists which outweighs the benefits of open proceedings, *Press-Enterprise I, supra*, 464 U.S. 501, 509. Determination of whether good cause exists necessarily involves the discretion of the lower court. The sole question then is whether limitations imposed on access by a trial court "...deny or unwarrantedly abridge...." First Amendment rights of communicating ideas and public discussion of issues, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, note 18. As will appear below, Judge Turner found and articulated concerns which far outweigh the limited denial of access occasioned by his orders.

II. RESPONDENT SUPERIOR COURT CORRECTLY BALANCED FIRST AND SIXTH AMENDMENT INTERESTS.

As appears from the facts in this case, the retrial of Offord Rollins would involve potentially excludable evidence of such a lurid and prejudicial nature that allowing potential jurors to hear it via the press would invite a second unfair trial. Judge Turner had the advantage of the Fifth District Court of Appeal's views on the nature of much the evidence, how the first trial was conducted and the presence of juror misconduct.

Judge Turner then fashioned two orders. First, public access to the motions in limine was denied for reasons clearly articulated in his Order, pages 5a through 7a of the Appendix to the Petition. Continuing, the Court below restricted media access to voir dire by precluding the use of acoustic and visual recording equipment; actual presence, the right to attend, take notes and report, was not denied to Petitioners.

Petitioners raised a further issue, requesting access to juror questionnaires. Preliminarily, the minimal nature of this intrusion must be underscored. Petitioners were not precluded from voir dire, at which questions were posed to potential jurors based upon, inter alia, their completed questionnaires.

Judge Turner articulated several reasons for not disclosing the questionnaires. Those reasons are found at Appendix pages 13a through 22a of the Petition. The reasons, although perhaps obvious in light of the first Rollins trial and its reversal, include concerns about juror reluctance to answer questions that touch upon the more prurient aspects of the case, their own racial or ethnic biases, prior knowledge of the facts and case and a host of other sensitive matters which arose in the first case. Issues of sodomy, sexual exhibitionism, multiple sexual partners and an allegedly abusive cross-cultural

relationship touch on areas of deep concern and privacy in the eyes of most Americans.

Assuring spontaneity and full disclosure by prospective jurors in these delicate and, for many, intrusive and embarrassing areas, especially given the prior reversal, clearly rises to the level of a concern justifying the slight limitation on media access. As judge Turner observed from the bench, page 14a of the Appendix to the Petition:

> "There is confidential information and information of necessarily a private nature that are asked in the questions based upon the circumstances of this particular case."

To be noted in both Judge Turner's written order and verbal ruling on Petitioners' application to the trial court, the in limine motions and jury questionnaires[1] were not ruled forever inaccessible. Judge Turner ordered they be kept confidential until "...the threat to the defendant's fair trial is passed." (Petition, Appendix page 7a.) As noted in the Statement of the case, no request for the questionnaires or a transcript of the motions in limine has been made since the People announced they would not again try Rollins. There is also, for this reason, a substantial question of ripeness present respecting the Petition.

However, the court below could rightly refuse to make the motions and jury questionnaires public, even though the threat to Rollins' fair trial right has passed, if good cause exists. The First Circuit overturned a statute which established a blanket proscription against making

---

[1]Petitioners are not, under California law, entitled to questionnaires of jurors not seated in the box, or juror identifying information, see Cal. Code of Civil Procedure §237; *Lesher Communications v. Superior Court*, 224 Cal.App.3d 774 (1990); *Copley Press , Inc. v. Superior Court*, 228 Cal.App.3d 77 (1991).

certain classes of criminal records public in *Globe Newspaper Company v. Pokaski*, 868 F.2d 497 (1st Cir. 1989). The First Circuit held (868 F.2d 497, 503) that public and media access to criminal records has never been unfettered, ultimately holding (868 F.2d 597, 510-511) records where no charges were issued could be protected, and that other criminal prosecution records could be withheld where the court ordering closure of the records articulates a compelling governmental interest.

Should the issue arise in the case at bar, it is entirely possible, in light of the repulsive nature of some of the evidence and questioning seen in the first trial, that the court could decide the privacy rights of the jurors are a compelling reason not to disclose the questionnaires, see *Press-Enterprise I, supra*, 464 U.S. 501, 512.

Press-Enterprise II, supra, 478 U.S. 1, 9-10,13, expressly recognized the threat posed by pretrial publicity, stating the trial court has an obligation to see if there is an "overriding interest" leading to a finding closure is necessary to preserve higher values, and thereupon narrowly tailors an order. This Court expressly mentioned a threat by publicity to an accused's fair trial right as being one such interest.

This Court noted one important purpose of preliminary hearings was to screen out untrustworthy or illegal evidence and insulate jurors from it. Inculpatory evidence revealed by pretrial publicity which is not admissible can predispose a community, the potential jury pool (note Sixth Amendment right to trial in the district where the crime occurred) against an accused, *Gannett v. DePasquale*, 443 U.S. 368, 378 (1979). Where, as in the present case, the inadmissible evidence and questioning includes accusations of sexual and sex-related conduct inherently repugnant to a large portion of society between an ethnically diverse alleged perpetrator and victim, and closure of not all preliminary matters, but motions in limine and voir dire questionnaires was not only proper; it was an imperative to assure an impartial jury and a fair trial, and to

prevent another prejudicial trial ending in yet another reversal.

California has, by legislation and the initiative process, set priorities respecting jurors, witnesses and crime victims. As a part of this effort, spurred by what the public saw as abuse of and imposition upon jurors, victims and witnesses, privacy rights of jurors were accorded heightened protection. California Code of Civil Procedure §206, as amended in 1992, 1993 and 1995, requires defendants to petition the court or access to juror contact information, for a lawful purpose including developing information for a new trial motion. Jurors are given the right to consent or decline such contact.

Code of Civil Procedure §237 specifically authorizes a court to seal juror information for compelling governmental interests. California courts interpret these two statutes as together establishing protection of jurors from unwanted intrusion as a compelling governmental interest, *Jones v. Superior Court*, 26 Cal.App.4th 1202 (1994).

In contrast to the lurid and prejudicial aspects of this case which Judge Turner correctly held from public dissemination pending Rollins' achieving a fair trial, Petitioners quibble with Judge Turner's use of the phrase "reasonable likelihood of prejudicial news" rather than having used the phrase "substantial probability," Petition, pages 3 and 4. The Petition continues, baldly asserting an absence of "specific findings" to justify the court's slight limitation of access. These assertions ignore the realities of the case above described, and the length of Judge Turner's rulings alone belies any contention of a lack of findings.

In *Press-Enterprise I, supra*, 464 U.S. 501, 510, this Court held that the lower court need articulate the interest to be protected together with findings which are simply "specific enough" that a reviewing court can determine whether the closure order was properly entered.

Judge Turner, referring expressly to *Press-Enterprise II* criteria, found that:

> "The history of this case has fostered overwhelming public interest and public scrutiny with corresponding media overage....There is no reason to assume at this point that the wealth of media coverage at any stage of the proceedings hereafter would be any less voracious than it has been to date." (Petition, app. pg.5a)

The ruling continues, noting the threat to jury selection by reason of the extreme media attention, and articulates the trial court's concern regarding "immediate public dissemination" of unreliable and "otherwise inadmissible" evidence, Petition, app. pg. 6a. In light of the extended and highly critical appellate opinion reversing the verdict in the first trial, well known to the parties in this case, a more than adequate basis for limiting access to pretrial motions in limine was articulated.

Similar concerns were voiced regarding the jury questionnaires. Beginning at page 13a of the appendix to the Petition, Judge Turner notes that the questionnaires contain information from which particular jurors could be identified, the need for spontaneous and, in essence, guileless juror responses, and the necessarily private nature of many questions posed under the particular circumstances of the case. In light of the juror conduct in the prior case and the sensational, prurient nature of much of the evidence and questioning in the first case, once again a more than adequate basis for limiting access appears.

Finally, the limited and narrow scope of Judge Turner's orders is again noted, for purposes of contrast with cases decided by this Court and various appellate courts. Access to voir dire in court was permitted, only the questionnaires were necessarily withheld. Only access to

the motions in limine was ordered, not other pretrial proceedings, with the comment (page 7a, appendix to Petition) access would be delayed only until the threat to Rollins' fair trial rights had passed. The latter event, again, did not occur until after the Petition was filed.

By comparison, *Press-Enterprise I, supra* 464 U.S. 501 involved denial of public access to all but three days of the six weeks of voir dire. Transcripts were later refused to the public as well. The lower court rested its orders on generic statements public presence at voir dire would result in a lack of juror candor, and that privacy rights of jurors outweighed access rights after the trial. Judge Turner's limitations were, by comparison, minuscule and tailored to the specific problems encountered in the first Rollins trial.

Press-Enterprise II, supra, 478 U.S. 1, the entirety of a 41 day preliminary hearing was closed for the stated concern only "one side" might get reported, and access to transcripts was later refused on similarly generic grounds. Judge Turner only precluded access to motions in limine, based upon "overwhelming" publicity surrounding the first trial, and with knowledge evidence of abhorrent conduct had been prejdicially insinuated into the first case.

Other cases where this Court has acted involve similarly more extreme and unreasoning conduct. Thus, in *Waller v. Georgia*, 467 U.S. 39 (1984), closure of an entire suppression hearing over the defendant's objection was criticized, the case turning on the absolute Sixth Amendment right of the accused to a public trial, where the prosecution offered no specifics as to their claim privacy rights were at stake, or how they were threatened.

In *Globe Newspaper Co. V. Pokaski*, 868 F.2d 497 (1st Cir., 1989) the court overturned a blanket statutory proscription of access to records in completed criminal cases. In *United States v. Three Juveniles, Globe Newspaper Co., Intervenor*, 61 F.3d 86 (1st Cir. 1995) closure of proceedings based upon the prosecution's decision not to seek transfer to adult status, opposition of

the juveniles to open proceedings and the possibility rehabilitation efforts would be hampered by the stigma arising from publicity was held adequate to preclude media access to all proceedings. In one last example, *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984) closure to protect a defendant's privacy and fair trial rights until the legality of wiretap evidence had been determined was found appropriate.

By comparison, how much more worthy of protection is evidence and questioning about heinous conduct likely to prejudice most members of the community, which evidence had already failed to pass appellate muster? The answer is obvious; more than adequate reasons for placing minimal restrictions on media access were found and expressed by Judge Turner in the case at bar.

III. NO THREAT OF FUTURE CONSTITUTIONAL VIOLATIONS EXISTS.

Although Petitioners go to great lengths to manufacture a controversy of Constitutional proportion, and even allowing that this Court may some day be required to provide further guidance on the subject of balancing First and Sixth Amendment rights in criminal cases, the present situation simply does not present a controversy or vehicle which raises that necessity. The trial court observed and applied principles announced by this Court, and the limited restrictions employed by the court below are amply justified by the facts and circumstances of this case.

Stated differently, Judge Turner's rulings are not unconstitutional as applied under the facts. Compelling reasons exist for excluding the press and public from the explosive and prejudicial evidence to be considered by motions in limine. Prevention of prejudice arising from lack of full disclosure by jurors, given the repugnant nature of some of the issues that had to be faced and questioned

upon, mandated keeping the questionnaires confidential. Further, public access to voir dire in court was permitted.

Judge Turner (pages 4a-5a, appendix to the Petition) correctly noted that trials are to be open absent an "overriding interest" requiring closure, precisely the language used by this Court in *Press-Enterprise II, supra,* 478 U.S. 1, 9-10, 13. Judge Turner then went on to articulate facts giving rise to a clearly overriding fair trial interest, all the more evident from the scathing reversal of the first trial.

The cases cited in the closing paragraphs of the preceding section all involved far broader issues. *Press-Enterprise I* found a public trial right in voir dire proceedings, and *Press-Enterprise II* similarly found a right of public access to preliminary hearings. *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir., 1984) extended public access to bail hearings.

The case at bar simply presents no similar issue of Constitutional dimension. The court below expressly acknowledged First Amendment[2] rights of public and media access at preliminary hearings and voir dire, fashioning a limited order of confidentiality required by the facts and circumstances consonant with Constitutional standards. There is no indication Judge Turner or the Kern County Superior Court has a practice or policy of excluding the public from criminal proceedings.

No basis or necessity for Supreme Court review therefore has been demonstrated.

IV. CONCLUSION

The Rollins prosecution was surrounded by massive press coverage from its inception. The first trial

---

[2]Sixth Amendment public trial rights of criminal defendants is not implicated, since Defendant Rollins was seeking closed voir dire and a closed preliminary hearing.

was a battle of images, the defense portraying Rollins as heroic, mannerly, a rising young star. The prosecution, unfortunately in hindsight, chose to vilify Rollins, casting him as a "sexual savage," attempting to admit evidence of, and insinuate by questioning, sodomy, multiple sexual relationships, exhibitionism, even offering "rap" lyrics and poetry composed by Rollins on a strained theory it reflected on motive, and for impeachment.

The debacle of the first trial yielded a conviction, reversed in a 247 page opinion critical of almost every aspect of the trial, and every participant. Rollins had been denied a fair trial due to cumulative error and, the last straw, a juror with prior knowledge of important facts, a juror who failed to reveal his extrajudicial knowledge and who expressed his opinions and conclusions to other jurors.

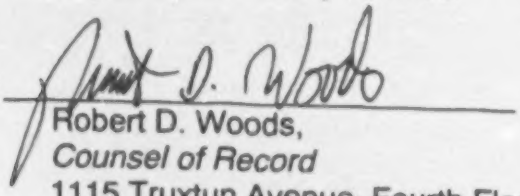
Under these circumstances, Judge Turner, being assigned the retrial, was more than amply justified in fashioning modest, closely tailored limitations on media access to preclude a replay of the first disastrous trial. Public access was allowed to every phase of the trial excepting motions in limine addressed to foundational issues. The only other modest denial of access concerned juror questionnaires which inquired about the explosive and, for most people, embarrassing evidence and questioning presented at the first trial. Access to courtroom voir dire was not precluded.

In placing these slight restrictions, Judge Turner acted with knowledge of, and in deference to Constitutional principles enunciated by this Court in *Press-Enterprise I & II*, and with due regard for the heightened protection of juror privacy enacted by California. There is hence no question presented which involves a Constitutional issue or a past or threatened future Constitutional violation.

For all the above reasons, Respondent Kern County Superior Court prays the Court deny the Petition, and for such other relief as to the Court appears just.

Respectfully submitted,

B. C. Barmann, Sr., County Counsel

By: 

Robert D. Woods,
Counsel of Record
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
(805) 861-2326

Counsel for Respondent,
Superior Court of California,
in and for the County of Kern

APPENDICES

APPENDIX A

California Code of Civil Procedure §206:

(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors they have an absolute right to discuss or not to discuss the deliberations with anyone. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (c) and (d).

.....

(f) Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for a new trial or any other lawful purpose. This information may include jurors' names, addresses, and telephone numbers. The court shall consider all requests for juror identifying information pursuant to Section 237.

California Code of Civil Procedure §237:

(a) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines, pursuant to subdivision (b), that a compelling governmental interest requires that this information should be kept confidential or its use limited in whole or in part.

(b) At the conclusion of a criminal jury proceeding, the court may,...order that all or part of court's record of personal juror identifying information be conditionally sealed upon finding that a compelling governmental interest warrants this action....

APPENDIX B

Amendment I, U. S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for redress of grievances.

Amendment VI, U. S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

Excerpts from the opinion of the California Court of Appeal, Fifth District, in the case of *People v Rollins*, Fifth District Case No. F020541

(Pages 91-92) To summarize, the record supports the trial court's determination, as to each motion, that appellant failed to establish a prima facie case of group bias. Although the court initially appears to have ruled based on a misunderstanding of the law, it subsequently reviewed the jury selection proceedings under the correct standard. Appellants rights were not violated by its actions in this regard, and his contentions on appeal must fail.

(Pages 92-93) During a search of Appellant's residence, police seized a number of rap poems or lyrics. The prosecutor moved, in limine, to have five of these writings admitted into evidence in her case-in-chief[3], pursuant to Evidence Code section 1101, subdivision (b). The prosecutor contended the poems were relevant and admissible on the issues of intent to kill, knowledge of guns, motive to kill, and identity. Appellant countered with his own motion in limine to completely exclude the rap poems. Appellant argued the evidence was irrelevant, improper under section 1101, subdivision (a), and should be excluded under section 352[4].

The trial court ruled that one poem--exhibit 5 of the prosecutor's motion--was admissible. That poem read:

"I die before

---

[3]Footnotes of the Court of Appeal are omitted.

[4]Cal. Evidence Code § 352 allows exclusion of evidence when, inter alia, the danger of prejudice outweighs any probative value.

"my dick starts to fizz
"pulled it out
"and m head smelled like fish
"rush to the shower
"to wash my dick
"Let me go, let me go
"Bitch let me go
"She wouldn't let me go
"So I slaped the ho
"don't get mad
"you fruit coctail
"See my rhymes
"Now you happy
"like a fag in jail
.....

2. Analysis

....

(Continuing at page 97) While we fail to see any relevance in the remainder of the poem, the People sought admission, and the defense exclusion, of the poem as a whole. The trial court was never asked to redact the writing. Accordingly, any objection specifically to other portions of the poem has been waived. (Citation omitted)

(Page 119) Marisol's testimony suggests appellant had access to a gun only if it is considered for the truth of the matter stated, i.e. as a prior inconsistent statement. We find it significant that the prosecutor did not use Marisol's testimony as the basis for a general argument that Andre was not a credible witness, but instead used the testimony to counter defense counsel's specific assertion about the gun. The clear implication to the jury was that Marisol's testimony should be used for substantive proof, not merely for impeachment. Urging the use of evidence for a purpose other than the limited purpose for which it was admitted is improper argument (citation omitted).

If the trial court admitted Marisol's testimony solely for impeachment, the prosecutor's argument was improper. However, defense counsel failed to object and request an admonition. However, defense counsel's failure to object and the question of prejudice will be discussed in parts VI and VII, post.

(Page 121) Appellant moved, in limine, to exclude evidence of his sexual relationship with Maria[5] on the grounds it was irrelevant and should be barred pursuant to section 352. The prosecutor countered that the nature and time frame of the relationship were highly probative. She mentioned that Maria kept a calendar which contained detailed notations regarding her contacts with appellant; the prosecutor intended to seek admission of this document for the nonhearsay purpose of showing Maria was obsessed with appellant. The prosecutor admitted she did not have any witnesses who were willing to testify they had observed Maria and appellant having sexual relations; However, she proposed to question appellant on that topic if he testified....

(Continuing on page 122) Appellant now asserts the prosecutor was not content to merely present evidence to support her claim about Maria's feelings toward appellant. Instead, "[S]he also sought, through a series of questions asked of various witnesses, to insinuate that appellant was some sort of sexual savage--one who got his kicks from exhibitionism, sodomy, extreme promiscuity and copulating in his own mother's bed." ....

(Page 123, quoting trial transcript) "And again I don't mean to embarrass [sic] you, but I need to ask specifically, did you and Mr. Rollins ever have sexual intercourse?"

"A. No."

---

[5]Maria was the murder victim.

"Q. Did you and Mr. Rollins ever have--have any--strike that. Did you and Mr. Rollins ever have anal intercourse?"

"MR. LEMUCCHI: I'll object to this. This is--She's calling this witness. This is outrageous to ask her that."

(Continuing at page 125) However, we fail to perceive the relevance of whether appellant and Nicole engaged in sodomy, or, for that matter, whether their romantic relationship involved acts of penetration. The record suggests no reason why it was not sufficient for the prosecutor's purpose to simply establish that appellant and Maria engaged in sex while appellant and Nicole did not, and that appellant's sexual use of Maria continued--at east once--during the time he and Nicole were supposed to have an exclusive relationship.

The issue as to the questioning of Nicole was not waived for purposes of appeal by defense counsel's failure to object on the grounds of misconduct. Given that the trial court overruled the initial relevance objection and even asked a question of its own, it seems clear any (p. 126) objection on the basis of misconduct would have been overruled....

Whether we consider this prosecutorial misconduct or trial court error, however, the jury heard evidence which should not have been admitted....

(Further example quoted at page 126) "Q. Mr. Harrison, you and Mr. Rollins are very good friends, aren't you?

"A. Yes.

"Q. He did allow you to witness him having sex with women, didn't he?

"A. Do I have to answer that? No.

"Q. It' your testimony you never witnessed Offord Rollins having sex with Maria?

"A. Correct.

(Continuing at page 129) The prosecutor's second evident purpose was to have the jury believe appellant did, in fact, allow Andre (Harrison) to watch him have sex with Maria. For example, the following occurred during closing argument:

[MS. GREEN:] "They want you to believe Offord Rollins is this some [sic] kind of all American guy and who wouldn't do this type of thing, but when you look at what the evidence has shown in this case, I believe that you will come to the conclusion that defendant has been shown to be a person who lies and cheats to his girlfriend. Lies to his (pg. 130)mother. Lies to the police. He lied to his father referring back to his father's statement, what else aren't you telling me? Defendant says, I'm telling you everything.

He uses the victim for sex. He allows his best friend Andre Harrison watch him engage in sex acts with the victim.

"MR. LEMUCCHI: I'll object to that as a misstatement of the evidence.

"THE COURT: There was no direct evidence of that, Miss Green.

"MS. GREEN: Yes. What I'm referring to is you can infer from Andre Harrison's statement at the preliminary hearing when he looked at the judge and said--when I asked him if Offord Rollins allowed you to watch sex acts with Maria, he looked at the judge and said, do I have to answer that? When the judge told him yes, he said no.

"Well, I will infer that he wasn't being honest when he answered in that way and neither was Mr. Rollins when he testified to that."

(Page 134) Because of the prosecutor's theory of motive, it was relevant and permissible for her to question appellant regarding whether he had sexual intercourse with Maria, and to contrast this relationship with Nicole. However, questions concerning whether he allowed Andre to watch him have sex with Maria or with other women

were clearly improper. (Citation omitted) In addition, the People concede the impropriety of asking whether appellant had sex in his mother's bed.

The people contend the questions about sodomy were relevant to show how sexually exploitive appellant was of Maria. However, this assumes consensual sodomy is somehow (pg. 135) more reproachable than consensual intercourse. Both were criminal acts, but only because of the ages of the participants (citation omitted.) Under the circumstances of this case, it was <u>at most</u> relevant for the prosecutor to establish appellant had sexual relations with Maria but not with Nicole.....

The relevance and propriety of the remaining questions--the exclusivity of appellant's relationship with Maria, the number of young women with whom appellant had sex between July 1990 and August 1991, his possession and use of condoms, and whether Maria was the first person with whom he had intercourse--are highly doubtful.

(Page 190) As an initial matter, and apart from any problem specific to Piceno, jury misconduct occurred because, as the trial court expressly found, jurors discussed the case before it was submitted to them....

(Continuing to page 191) The jury was appropriately admonished numerous times. Jurors were also told the admonition applied through trial and until they started deliberating. Nevertheless, it is clear that a number of jurors conversed among themselves about the case during the course of the trial.

(Page 194) Clearly, Piceno's personal knowledge and experience constituted "material outside the record" (Citation omitted) as it was not evidence which came from the witness stand during trial. In addition, "[I] is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (Citation omitted.) Thus, whether

we consider what occurred in terms of Piceno's conduct in using the knowledge himself, in sharing his knowledge and experience with other jurors, or in terms of other jurors' receipt of such information, it is apparent misconduct occurred.